VIRGINIA LAW REGISTER

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Editorial Note.

We desire to thank the learned Editor of *The Lawyer and Banker,* Mr. Charles E. George, for the very kind and complimentary notice which he gave of the Editor-in-Chief in his number for June, 1919; but we are glad to give proper credit for the editorial in our April number alluded to by *The Lawyer and Banker* to our Associate Editor, Mr. Stedman, who wrote all the editorials in both the March and April numbers. It was a natural mistake, however, on the part of the Editor of *The Lawyer and Banker,* for as a general rule all of the editorials of our Associate are initialed. We must say, however, that we concur most heartily in the views expressed by our Associate. We set out Mr. George's editorial in full under "Miscellany."

Roster of Our Supreme Court Judges.

The readers of the REGISTER and the profession at large owe a debt of gratitude to our friend, Hon. W. W. Scott, the accomplished librarian of the Supreme Court of Appeals of Virginia, for the roster of the Judges of that Court which it is our pleasure to publish in this number. A proper arrangement of the portraits of the Judges in the Supreme Court Room has for the first time been made by Mr. Scott, who has as far as possible grouped them together according to their service. It is to be regretted that there are so few of these portraits, and it is to be hoped that hereafter every Judge will make provision to have his portrait hung in the Court Room. We publish this article of Mr. Scott's with much pleasure and are sure it will be read with as much pleasure as we take in publishing it.

The Twentieth Meeting of the Virginia State Bar Association.

The meeting of the Association in the city of Richmond on May 15th was the most successful one for several years. Nearly two hundred members attended and the meeting was characterized by good fellowship, admirable papers and addresses.

The President, Lucien H. Cocke, after the meeting had been called to order by Norvell L. Henly, Chairman of the Executive Committee, in the auditorium of the beautiful Jefferson Hotel, on the morning of the 15th, delivered an admirable address on Reconstruction Titles. Mr. A. W. Patterson, of the committee on Legislation and Law Reform, read an excellent report, which we reproduce in this number of the REGISTER.

That afternoon autos were provided for visitors and their families and an opportunity given to inspect the marvelous growth of our beautiful, interesting and historic capitol. That night the Richmond Bar Association gave a reception to the General Association, at the exquisite Country Club—a reception in which beautiful women and handsome men were in the majority, and lavish entertainment afforded in the shape of luscious viands, pleasant conversation, good music and dancing for those who cared to dance.

On Friday Judge Burk's paper on the Code was read by Clerk Williams, of the House of Delegates, Judge Burks having been compelled to return home on account of sudden illness We had the great pleasure of publishing this paper in full in our last number, readily giving it the space it deserves, and omitting other matter which will appear in this and later numbers. The value of this paper to the profession was so evident that we did not hesitate to do this. The Code will appear this summer and with this article before them the Bar will have an opportunity to compare it with former statutes and be more able to use it understandingly than they could do otherwise.

The election of officers took place immediately after the reading of this paper.

Randolph Harrison, Esq., of the Lynchburg Bar, was elected President; John B. Minor, Secretary and Treasurer.

That afternoon a reception was given to members of the As-

sociation and the ladies accompanying them, at the "John Marshall House," by the Association for Preservation of Virginia Antiquities. This fine old mansion has been restored and is to be kept *in perpetuo* as a memorial of the great Chief Justice, who had it built and lived and died beneath its roof.

That night Dr. R. M. McElroy delivered a most timely and eloquent address on "Campaign for the Study of the Constitution." After its conclusion Harry St. George Tucker read a special report on the League of Nations—or to be more accurate, delivered an address in explanation and elucidation of the most admirable report which he had prepared and which had been printed, distributed and read by nearly every member of the Association prior to the meeting.

Quite a discussion followed and to our amazement we found some opposition to the League. When the vote was taken, however, it was seen that an overwhelming majority was in favor of the League.

On Saturday, May 17th, Hon. Frederick A. Coudert, of the New York Bar, delivered the Annual Address, entitled "Law *v.* Diplomacy in the Proposed Constitution of the League of Nations." The applause which greeted the finished periods and clear, logical argument which characterized this address left no room for doubt as to where the Association stood on this great question, even if the vote of the night before had not clearly demonstrated it.

This meeting was pronounced by all who attended as one of the most pleasant and successful meetings which the Association had ever held. The change in the time and place of meeting met with universal approval and the REGISTER feels that to some small extent its article in the October 1918 number contributed to this change. We believe that the month of May and some large city as the time and place of meeting will always attract a larger crowd than any other time and place. Natural Bridge has been suggested as the place of the next meeting. If the hotel accommodations are sufficient we believe it might not be unwise to try this charming place, but the meeting, in our judgment, should never be later than the first week in June and we believe the cities are more likely to draw a crowd than any other place.

Virginia Cases in the Supreme Court of the United States.

Virginia looms rather largely in the decisions handed down at the October 1918 term of the Supreme Court. The case of *Andrews* v. *Virginia Railway Company* went directly from the Circuit Court of Roanoke County but was dismissed for want of jurisdiction. The case of *United States of America* v. *Homer Gudger,* decided April 14th, 1919, was a case from the District Court of the United States for the Western District of Virginia and decided that the Reed Amendment did not include the movement of intoxicating liquors through a dry state as a mere incident of the transportation to another state, whether said transportation be by personal carriage or by a common carrier. And in the case of *Darling* v. *City of Newport News,* decided April 28th, 1919, in error to the Supreme Court of Appeals of the State of Virginia, that Court was affirmed which dismissed a bill in a suit to enjoin a municipality from discharging its sewage in such a way as to pollute and ruin plaintiff's oysters upon his beds in tidal waters, the Federal Supreme Court following the ruling of the highest Virginia Court that the provision of the Virginia Constitution 1902, sec. 58, requiring compensation for property taken or damaged for public use does not include damages which would not have been a wrong even without an act of the Legislature sanctioning it. The case of the *Postal Telegraph Company* v. *Richmond,* decided March 1917, is commented upon in the following editorial.

License Tax upon Telegraph Companies by Municipal Corporations.

The Supreme Court of the United States has sustained an appeal from the District Court of the United States for the Eastern District of Virginia, in the case of *Postal Telegraph Co.* v. *Richmond* decided March 17 reviewing a decree dismissing the bill in a suit by the telegraph company to enjoin the collection of certain municipal license taxes. The City of Richmond put an annual license tax of $300.00 upon the Postal Telegraph Cable Company for the privi-

lege of doing business within the City limits, excluding interstate and Government service, and also imposed an annual fee of two dollars for each telegraph pole that the company erected within the City limits. The Company of course fought this license tax and two-dollar fee on the usual and familiar ground that the Company being engaged in interstate and Government service the City could not impose this tax and fee, because the cost of doing the intra-state business transacted by the Company at Richmond is higher than the receipts from it, and therefore, since both taxes must be paid, if at all, from receipts from inter-state commerce, they constituted such a burden upon that commerce of the Company as to render them unconstitutional and void. The Supreme Court quoted numerous cases and then decided as follows in regard to the license taxes, which was sustained.

The principle of these cases, and of many others cited in the opinions, is that, as against Federal constitutional limitations of power, a state may lawfully impose a license tax, restricted, as it is in this case, to the right to do local business within its borders, where such tax does not burden, or discriminate against, interstate business, and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce. Such a tax is not, as is argued, an inspection measure, limited in amount to the cost of issuing the license or supervising the business, but is an exercise of the police power of the state for revenue purposes, restricted to internal commerce, and therefore within the taxing power of the state. *Postal Teleg.-Cable Co.* v. *Charleston,* 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Williams* v. *Talladega,* 226 U. S. 404, 416, 57 L. ed. 275, 280, 33 Sup. Ct. Rep. 116; and *Western U. Teleg. Co.* v. *Alabama Bd. of Assessment* (*Western U. Teleg. Co.* v. *Seay*), 132 U. S. 472, 473, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161.

In regard to the two-dollar fee for each pole, the Court quoted numerous cases heretofore decided by it and stated that as long as the fee was reasonable the City would be allowed to charge it, in view of the fact that the erection of the poles and wires

of the Company necessarily laid burdens upon the City in regard to the extra amount of care required in looking after its streets.

State Taxation upon a Common Carrier Engaged in Inter-State and Intra-State Commerce Proportioning Local Value to Entire Sysem. Reversals by the Court of Previous Cases.

There is a coolness almost sublime in the way in which the Supreme Court of the United States reverses itself without reversing the cases previously decided, but by molding them into such shape as to suit a subsequent opinion. This has never been better demonstrated than in the case of *Union Tank Line* v. *Wright, Comptroller General of Georgia,* 39 Sup. Ct. Rep. 276, decided March 24th, 1919. The State of Georgia made the ratio that the miles of railway in a state over which move the oil tank cars of a foreign equipment Company (not carrying on business within the state and having no office there) bears to the total mileage so traversed by its cars in all the states the sole basis of an assessment for state taxation of the property of such corporation. This was decided by the Supreme Court to be a method so arbitrary and producing results so unreasonable that to enforce the tax would be to take property without due process of law, and unduly burden inter-state commerce, the valuation arrived at being nearly three hundred thousand dollars and the value of the average number of tank cars within the state during the year —the only property the corporation had in the state—being less than fifty thousand dollars. Mr. Justice Pitney dissented and Justices Brandeis and Clarke concurred with him, showing distinctly that this method of discussion had been very clearly sustained by the Supreme Court in *Pullman Palace Car Company* v. *Pennsylvania,* 141 U. S. 18, a case decided in the year 1894, and followed repeatedly and never questioned in the least until in the instant case. The Justice says, "The tax laws of the State of Georgia, and doubtless of many other states, have been based upon that decision and I regard it as most unfortunate that at

this late date this authority should be overturned." No one can hesitate to agree with the three learned Justices of this conclusion and it is to be deeply regretted that a decision of this character and this grave importance, upon which the numerous tax laws have been based should be thus overturned. Mr. Justice Pitney quotes from the decision in the Pullman Company case as follows:

"Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. * * * The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the state to other states or countries. * * * The tax on the capital of the corporation, on account of its property within the state, is, in substance and effect, a tax on that property. * * * The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. * * * The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. * * * The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state.

"*The mode which the state of Pennsylvania adopted, to ascertain the proportion of the company's property upon*

which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. [Italics mine.] The validity of this mode of apportioning such a tax is sustained by several decisions of this court," etc.

His opinion continues as follows:

"It was upon this decision, among others, that the Supreme Court of Georgia relied as authority for its judgment. I cannot agree that any part of what I have quoted—least of all the italicized clause which relates to the apportionment of the tax according to track mileage—was obiter dictum or unnecessary for the decision. It was necessary—certainly so this court deemed it—that the disputed tax be vindicated as a property tax in order to relieve it from the criticism that it was an unwarranted interference with interstate commerce; and it could not be sustained as a property tax unless the method of apportionment was fair and equitable. The authority of the case cannot properly be overthrown by showing, even if it could be shown, that the court might have reached the same result upon some other ground than that which in truth it adopted as the basis of its decision. And it seems to me that a considered judgment of this court upon a constitutional question affecting the taxing powers of the states, long acted upon as a guide to state legislation upon this important and difficult matter, ought not to be set aside without more cogent reasons than any that are here adduced. Certainly the fact that the established rule of taxation may operate with hardship or even with apparent injustice in a particular case is not sufficient to condemn it.

"The decision referred to, *Pullman's Car Co.* v. *Pennsylvania, supra,* has always been regarded as a leading case, and cited with uniform approval in repeated decisions of this court, not only upon the point that property employed in interstate commerce, and in the ordinary use of it situate sometimes within and sometimes without a state, is subject to state taxation without regard to the place of the owner's domicile, but also and especially in support of the proposition that the mileage basis of apportionment as be-

tween the different states may be resorted to in order to determine what tax each state shall lay upon rolling stock used upon interstate railroads, just as it often is resorted to in apportioning the tax upon a railroad as beween different taxing districts in the same state.

"The reasoning of the case upon the point now in controversy has never heretofore been regarded as obiter dictum. On the contrary, it was cited in support of the mileage basis of apportionment for the taxation of a railroad in *Pittsburgh, etc., R. Co.* v. *Backus,* 154 U. S. 421, 431, 14 Sup. Ct. 1114, 38 L. Ed. 1031, and, in *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 221, 17 Sup. Ct. 305, 41 L. Ed. 683, to sustain a mileage apportionment with respect to interstate express companies, notwithstanding the absence of physical unity. *Adams Exp. Co.* v. *Ohio,* 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965.

State Prohibition Law. Liquors Acquired before the Law Became Effective.

There seems to be quite a misunderstanding of the decision of the Supreme Court of the United States in the case of *Barbour* v. *State of Georgia,* 39 Sup. Ct. Rep. 316, decided April 14th, 1919, as most people seem to think that the Supreme Court decided that the prohibition law of Georgia permitted the confiscation of any ardent spirits found in the possession of a citizen of that state after the law became effective. But the decision does not go to this extent. The prohibitory liquor law was passed by the State of Georgia and approved November 18th, 1915, but by its terms did not become effective until May 1st, 1916. Barbour was convicted for having in his possession on June 10th, 1916, more than one gallon of vinous liquor. He asserted that the liquor had been acquired by him before May 1st and contended that the statute, if construed to apply to liquor so acquired was void under the 14th Amendment. The Supreme Court of the State overruled his contention and affirmed the sentence, and the United States Supreme Court sustained that court, saying:

That a state which has enacted a prohibitory law may forbid the mere possession of liquor within its borders was decided in *Crane* v. *Campbell,* 245 U. S. 304, 62 L. ed. 304, 38

Sup. Ct. Rep. 98; but it did not appear there when the liquor had been acquired. Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in *Bartemeyer* v. *Iowa,* 18 Wall. 129, 21 L. Ed. 929, and *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25, 32, 33, 24 L. ed. 989, 991, 992, but was not decided. The question presented here, however, is simpler, for the exact date when Barbour acquired the liquor is not shown, and we must assume, as the Supreme Court of Georgia did, that it was acquired during the period of five months and twelve days between the enactment of the law and the date when it became effective. Does the 14th Amendment, by its guaranty to property, prevent a state from protecting its citizens from liquor so acquired?

A state having the power to forbid the manufacture, sale, and possession of liquor within its borders, may, if it concludes to exercise the power, obviously postpone the date when the prohibition shall become effective, in order that those engaged in the business and others may adjust themselves to the new conditions. Whoever acquires, after the enactment of the statute, property thus declared noxious, takes it with full notice of its infirmity and that after a day certain its possession will, by mere lapse of time, become a crime. It is well settled that the federal Constitution does not enable one to stay the exercise of a state's police power by entering into a contract under such circumstances. *Diamond Glue Co.* v. *United States Glue Co.,* 187 U. S. 611, 615, 23 Sup. Ct. 206, 47 L. Ed. 328. Compare *Calder* v. *Michigan,* 218 U. S. 591, 599, 31 Sup. Ct. 122, 54 L. Ed. 1163. Nor can he do so by acquiring property.

The defendant raised in his amended motion for a new trial the further objection that the law was unconstitutional as applied to him because the liquor had been acquired before the statute was enacted, but the trial judge denied the motion and declined to approve any of the grounds on which it was based. In accordance with the state practice the state court therefore refused to consider that point and the Supreme Court of the United States declined to express any opinion upon it, so it is an open question as to whether ardent spirits acquired by any person prior to the *passage* of a prohibition law is subject to confiscation. For there is no question about it that, without mincing words, the effect of prohibition laws is to confiscate

ardent spirits and to hold practically that a man can have no property in ardent spirits after the prohibition law has been passed. So we do not see how a thief could be convicted for stealing liquor in any state in which a prohibition law has taken effect; and under the present law and the decisions of the courts, George Washington's distillery at Mt. Vernon could have been actually destroyed as far as its use as a distillery was concerned, and every barrel of liquor held therein could have been confiscated without in any way remunerating George for the loss of what was formerly property, and Mr. Jefferson's and Mr. Madison's stock of Madeira and other wines for which they paid large sums of money could have been confiscated without being paid their value by the state.

So we find that clause in the Constitution which provides that property shall not be taken for public use without compensation nullified absolutely by the prohibition laws. The so-called oppressed monarchies of Europe have not done this. England paid the value of any distillery she caused to stop operation, and where any property in ardent spirits or wines was taken the Government paid the full value. It is only in a "free country" like America that such confiscation is permitted under the guise of law.